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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 2, 11, 23, and 52

[FAC 2005-58; FAR Case 2010-004; Item I; Docket 2010-0004, Sequence 2]

RIN 9000-AM03

Federal Acquisition Regulation; Biobased Procurements

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement changes due to the Farm Security and Rural Investment Act that require contractors to report the biobased products purchased under service and construction contracts. This reporting will enable agencies to monitor compliance with the Federal preference for purchasing biobased products.

DATES: Effective Date: [INSERT DATE 30 DAYS AFTER

PUBLICATION IN THE FEDERAL REGISTER.]

FOR FURTHER INFORMATION CONTACT: Mr. William Clark, Procurement Analyst, at 202-219-1813, for clarification of content. For information pertaining to status or

publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-58, FAR Case 2010-004.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the Federal Register at 76 FR 41179 on July 13, 2011, to implement section 9002 of the Farm Security and Rural Investment Act of 2002, as amended by the Food, Conservation, and Energy Act of 2008 (Pub. L. 110-246). These statutory provisions are codified at 7 U.S.C. 8102. This section of the United States Code requires Federal agencies to establish a procurement program, develop procurement specifications, procure biobased products, and give preference to those items that are composed of the highest percentage of biobased products practicable or those products that comply with the regulations issued under section 103 of Pub. L. 100-556 (42 U.S.C. 6914b-1). Title 7 U.S.C. 8102 provides Federal agencies the flexibility not to procure biobased products if the product cannot be acquired—

- (a) Within a reasonable time frame providing for compliance with the contract performance schedule;
- (b) Meeting reasonable performance requirements; or
- (c) At a reasonable price.

The Biobased Products Preference Program was originally implemented in FAR Case 2004-032, which was published in the

Federal Register at 72 FR 63040, November 7, 2007. This final rule implements additional elements of 7 U.S.C. 8102 as amended by Pub. L. 110-246. This final rule also meets the direction in the Presidential Memorandum, "Driving Innovation and Creating Jobs in Rural America through Biobased and Sustainable Product Procurement," dated February 21, 2012, to amend the FAR to require reporting of biobased product purchases. Two respondents submitted 14 public comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of changes to the FAR

1. The definition of "biobased product" is revised at FAR 2.101.

2. A prohibition against agencies collecting more data than typically would be provided by other entities (other than data confirming the biobased content) was added to FAR 11.302.

3. The clause at FAR 52.223-2, Affirmative Procurement of Biobased Products Under Service and Construction Contracts, is amended to require annual

reporting by the contractor of the types and dollar value of any U.S. Department of Agriculture (USDA)-designated biobased products purchased during the preceding fiscal year on the contract.

4. References to the USDA's BioPreferred Program are updated to conform to the agency's relocation of the program's rules in the Code of Federal Regulations (see 76 FR 53631 dated August 29, 2011).

5. USDA established a blanket exemption for all USDA-designated biobased items from the Biopreferred Program's requirements for procurements involving combat or combat-related missions and for spacecraft systems and launch support equipment (see 73 FR 27953 dated May 14, 2008). FAR 23.404(b)(2) and 52.223-2(a)(2) are updated to conform to the blanket exemption.

B. Positive comments

Comments: Both respondents stated their strong support for the proposed rule. One respondent viewed it "as a necessary action to implement existing laws and policies for purchasing biobased products by federal agencies and contractors."

Response: Noted.

Comments: One respondent expressed particular support for the provision in the proposed rule directing contracting officers to refer to the USDA list of designated biobased

items. Both respondents agreed that the USDA list is an important and growing reminder of the availability of biobased products.

Response: Noted. However, the preference for use of biobased products that are USDA-designated items existed at FAR 52.223-2(a) prior to the proposed rule.

Comments: Both respondents expressed support for the requirement that contractors report annually on the biobased products purchased and their dollar value. One respondent stated that such annual reports, by contractors and agencies, will help measure the growth and success of the program and ensure agency and contractor compliance with the law.

Response: Noted. Also see section C below regarding reporting and section V for a comment on the reporting burden associated with this rule.

C. Definitions

Comment: One respondent noted that neither "cognizant environmental manager" nor "agency environmental manager" was defined in the proposed rule. The respondent suggested that more clarity was needed, and the "person to whom the product type and dollar value data are reported should be someone who can ensure that the data are properly collected and tabulated and made available for reporting into the Federal Procurement Data System or other system that will

allow each agency to report the information to the Office of Federal Procurement Policy, as required."

Response: The clause at FAR 52.223-2, Affirmative Procurement of Biobased Products Under Service and Construction Contracts, has been revised at paragraphs (c) and (d) to eliminate any reference to the environmental manager and change the reporting requirement to the environmental point of contact, with a copy of the report to be sent to the contracting officer. Together, these revisions eliminate any need for additional definitions in the FAR coverage.

D. Allow no exceptions or waivers

Comment: Strongly supporting the program's requirement that all Federal agencies and contractors purchase USDA-designated biobased products, one respondent recommended that no exemptions or waivers should be allowed under any circumstances.

Response: Exemptions or waivers, under certain circumstances, to the acquisition of USDA-designated biobased products are recognized by the Farm Security and Rural Investment Act of 2002, 7 U.S.C. 8102, and Executive Order 13514, entitled "Federal Leadership in Environmental, Energy, and Economic Performance," dated October 5, 2009. These exemptions or exceptions previously have been implemented in the FAR.

E. Out-of-scope comments

Comments: One respondent presented recommendations for the elements on which the Office of Management and Budget (OMB) should report annually in order to ensure compliance. These recommendations included mandatory reporting elements for each agency, department, and its contractors. The respondent asserted that there should be additional reporting required by DoD. The second respondent noted that section 9002(a)(4)(B) of the statute provides specific annual reporting requirements for the GSA and Defense Logistics Agency and queried why those agency reporting requirements were not addressed in the proposed rule.

Response: The FAR addresses requirements for contractors. OMB is responsible for determining agency reporting requirements. Therefore, these comments are outside the scope of this rule.

Comment: One respondent recommended that, in order to ensure full compliance, DoD should seek to update 100 percent of its specifications to include biobased products by December 31, 2013.

Response: The internal review of specifications by a particular agency is outside the scope of this rule.

Comment: One respondent recommended that a complete inventory management system needed to be created to track the biobased products purchased by all Federal agencies.

The respondent stated that "(t)his scorecard should contain information on agencies and departments purchasing biobased products and contracts." According to the respondent, codifying the biobased products acquisition reporting structure in the FAR would lead to more market pull.

Response: The FAR addresses requirements for contractors. OMB is responsible for determining agency management and reporting requirements. Therefore, this recommendation is outside the scope of this rule.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

The Department of Defense, General Services Administration, and National Aeronautics and Space Administration have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

DoD, GSA, and NASA are amending the Federal Acquisition Regulation (FAR) to implement section 9002 of the Farm Security and Rural Investment Act of 2002, codified at 7 U.S.C. 8102, as amended by the Food, Conservation, and Energy Act of 2008 (Pub. L. 110-246).

Title 7 U.S.C. 8102 requires Federal agencies to establish a procurement program, develop procurement specifications, procure biobased products, and give preference to those items that are composed of the highest percentage of biobased products practicable or products that comply with the regulations issued under section 103 of Pub. L. 100-556 (42 U.S.C. 6914b-1).

This final rule modifies FAR 52.223-2, Affirmative Procurement of Biobased Products Under Service and Construction Contracts, to require prime contractors to report the product types and dollar value of any USDA-designated biobased products purchased during the preceding fiscal year. The information reported by prime contractors will enable Federal agencies to (a) report annually to the Office of Federal Procurement Policy (OFPP) information concerning actions taken to implement the preference for biobased products and (b) assess compliance and measure progress in carrying out the preference for biobased products. Further, OFPP must collect the information reported by the agencies and make it publicly available on an annual basis.

There were no public comments filed in response to the Initial Regulatory Flexibility Analysis.

The rule promotes the use of biobased products and requires an annual report on the product types and dollar value of any U.S. Department of Agriculture (USDA)-designated biobased products purchased by the prime contractor during the previous year. By averaging data from Fiscal Years 2009 and 2010 in the Federal Procurement Data System (FPDS), we estimate that 48,376 contractors will be affected. Of those entities, approximately 35,927 (70 percent) will be

small businesses. This estimate is based on contract actions from the following selected Product Services Codes (PSCs):

- A-Research and Development;
- F-Natural Resources Management;
- J-Maintenance, Repair, and Rebuilding of Equipment;
- M-Operation of Government-Owned Facility;
- S-Utilities and Housekeeping Services;
- T-Photographic, Mapping, Printing, and Publication Services;
- Y-Construction of Structures and Facilities;
and
- Z-Maintenance, Repair or Alteration of Real Property.

We believe the clause will apply to most of the contract actions in the selected PSCs. Based on the Fiscal Year 2009 FPDS data collected, there were 55,174 unique Data Universal Numbering System (DUNS) numbers performing such contracts, and 40,741 of these were small businesses. Based on the Fiscal Year 2010 FPDS data collected, there were 41,578 unique DUNS numbers, and 31,113 of these were small businesses.

Where information on the biobased nature of products is not already available, contractors may need to create an inventory management system to track the product types and dollar value of USDA-designated biobased products purchased for each contract. However, DoD, GSA, and NASA expect that the impact will be minimal because the existing clause already requires contractors to make maximum use of biobased products in the performance of services and construction contracts, and the change does not impose any substantial new requirements other than the prime contractor reports. Small businesses are active suppliers of biobased products, and this rule may serve to enhance their participation in this market.

The types of skills required to prepare the report include data gathering, research, quantitative, editing, and drafting. We estimate the personnel required would be equivalent to a Government employee at a GS-11, step 5 salary.

There are no other reporting, recordkeeping, or other compliance requirements associated with this rule. There is no impact, positive or negative, on small businesses. Thus, there are no professional skills necessary on the part of small businesses. There are no direct costs to small business firms to comply with this rule.

The rule does not duplicate, overlap, or conflict with any other Federal rules. DoD, GSA, and NASA were not able to identify any significant alternatives that would accomplish the objectives of the statute. Further, the impact of this rule on small entities is expected to be generally positive.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat. The Regulatory Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

V. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) applies. The rule contains information collection requirements. OMB has cleared this information collection requirement under OMB Control Number 9000-0180, titled "Biobased Procurements."

One comment was received on the paperwork burden associated with this rule. It is summarized below.

Comment: The respondent believed that the required reporting does not have to be burdensome, because the clause at FAR 52.223-2, Affirmative Procurement of Biobased Products Under Service and Construction Contracts, already provides that the contractor shall make maximum use of USDA-designated biobased products (with certain exceptions). The

respondent noted that, in order to comply with this current requirement, contractors should already be keeping records. Adding the dollar value of those items and reporting annually should not add a significant burden, according to the respondent. The respondent suggested that agencies should further simplify the reporting burden by making available an electronic template for the required report.

Response: The FAR does not designate practices to be used internally by Government agencies. Although providing an electronic reporting template for use by contractors seems to be a good idea, the FAR is not the proper vehicle for its designation.

List of Subjects in 48 CFR Parts 1, 2, 11, 23, and 52

Government procurement.

Dated: April 11, 2012.

Laura Auletta,
Director,
Office of Governmentwide
Acquisition Policy,
Office of Acquisition Policy,
Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 2, 11, 23, and 52 as set forth below:

1. The authority citation for 48 CFR parts 1, 2, 11, 23, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 1—FEDERAL ACQUISITION REGULATION SYSTEM

1.106 [Amended]

2. Amend section 1.106 in the table following the introductory text, by adding in sequence, FAR segment "52.223-2" and its corresponding OMB Control Number "9000-0180".

PART 2—DEFINITIONS OF WORDS AND TERMS

2.101 [Amended]

3. Amend section 2.101 in paragraph (b)(2), in the definition "Biobased product" by removing "(including plant, animal, and marine materials) or" and adding "and" in its place.

PART 11—DESCRIBING AGENCY NEEDS

4. Amend section 11.302 by revising paragraph (c)(2) to read as follows:

11.302 Policy.

* * * * *

(c) * * *

(2) For biobased products, agencies may not require, as a condition of purchase of such products, the vendor or manufacturer to provide more data than would typically be provided by other business entities offering products for sale to the agency, other than data confirming the biobased content of a product (see 7 CFR 3201.8).

PART 23—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

23.401 [Amended]

5. Amend section 23.401 by removing from paragraph (b)(1) "part 2902" and adding "part 3201" in its place.

6. Amend section 23.404 by revising the introductory text of paragraph (b)(2); and removing from paragraph (e)(1) "(including plant, animal, and marine materials)". The revised text reads as follows:

23.404 Agency affirmative procurement programs.

* * * * *

(b) * * *

(2) EPA and USDA may provide categorical exemptions for items that they designate, when procured for a specific purpose. For example, all USDA-designated items (see 7 CFR 3201.3 (e)) are exempt from the preferred procurement

requirement for the following:

* * * * *

7. Amend section 23.405 by removing from paragraph (a) (2) "<http://www.usda.gov/biopREFERRED>" and adding "<http://www.biopREFERRED.gov>" in its place; and adding paragraph (a) (3) to read as follows:

23.405 Procedures.

(a) * * *

(3) When acquiring recovered material or biobased products, the contracting officer may request information or data on such products, including recycled or biobased content or related standards of the products (see 11.302(c)).

* * * * *

23.406 [Amended]

8. Amend section 23.406 by removing from paragraph (b) "contracts unless" and adding "contracts, unless" in its place; and removing "<http://www.usda.gov/biopREFERRED> or 7 CFR Part 2902" and adding "<http://www.biopREFERRED.gov> or 7 CFR part 3201" in its place.

PART 52-SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.223-1 [Amended]

9. Amend section 52.223-1 by removing "(DEC 2007)" and adding "([INSERT 30 DAYS AFTER PUBLICATION IN THE FEDERAL

REGISTER])" in its place; and removing "part 2902" and adding "part 3201" in its place.

10. Amend section 52.223-2 by:

- a. Revising the date of the clause;
- b. Revising paragraph (a)(2) introductory text; and
- c. Adding paragraphs (c) and (d).

The revised and added text reads as follows:

52.223-2 Affirmative Procurement of Biobased Products Under Service and Construction Contracts.

* * * * *

AFFIRMATIVE PROCUREMENT OF BIOBASED PRODUCTS UNDER SERVICE AND
CONSTRUCTION CONTRACTS ([INSERT 30 DAYS AFTER PUBLICATION IN THE
FEDERAL REGISTER])

* * * * *

(a) * * *

(2) The product is to be used in an application covered by a USDA categorical exemption (see 7 CFR 3201.3(e)). For example, all USDA-designated items are exempt from the preferred procurement requirement for the following:

* * * * *

(c) In the performance of this contract, the Contractor shall—

(1) Report to the environmental point of contact identified in paragraph (d) of this clause, with a copy to the Contracting Officer, on the product types and dollar value of any USDA-designated biobased products purchased by the Contractor during the previous Government fiscal year, between October 1 and September 30;

(2) Submit this report no later than—

(i) October 31 of each year during contract performance; and

(ii) At the end of contract performance; and

(3) Contact the environmental point of contract to obtain the preferred submittal format, if that format is not specified in this contract.

(d) The environmental point of contact for this contract is: _____ [Contracting Officer shall insert full name, phone number, and email address. In addition, the Contracting Officer may include the agency website for reporting.]

* * * * *

[BILLING CODE 6820-EP]

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